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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	
Communications Assistance for Law Enforcement Act	CC Docket No. 97-213

REPLY COMMENTS REGARDING
FURTHER NOTICE OF PROPOSED RULEMAKING

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SUMMARY

In response to the Commission's Further Notice of Proposed Rulemaking, the parties who oppose the government's rulemaking petition have raised a host of objections to the Commission's tentative conclusions about the assistance capabilities at issue in this proceeding. The commenters variously argue that the capabilities tentatively approved by the Commission are not required by CALEA; that they are technically infeasible; that they are ruinously expensive; and that, if they are nevertheless adopted by the Commission, they cannot be implemented without protracted delay.

In the main, these arguments are not new. Instead, they simply repeat and elaborate on the arguments that the commenters made in earlier rounds of this rulemaking. The Commission rightly found those arguments unpersuasive when it issued the Further Notice of Proposed Rulemaking, and nothing that the commenters have said in the latest round of comments provides any reason for the Commission to revise that judgment.

Although the commenters attack the Commission's tentative conclusions from a variety of different angles, their arguments have one thing in common: a fundamental unwillingness to acknowledge the law enforcement interests at stake in this proceeding. As we have explained before, the ability to carry out legally authorized electronic surveillance is vital to the efforts of federal, state, and local law enforcement agencies to protect the public by detecting, preventing, and prosecuting criminal activity. The underlying purpose of CALEA was to close the growing gap between law enforcement's legal authority to conduct electronic surveillance and its technical ability to carry out that authority. Yet, if the J-Standard is not modified to include the assistance capabilities at issue in this proceeding, law enforcement inevitably will be denied information about

criminal activity to which it is legally entitled and which it needs to protect public safety and security. The commenters have averted their eyes to this outcome; the Commission must not.

As part of this filing, we are submitting declarations by the Director of the Federal Bureau of Investigation and the Administrator of the Drug Enforcement Administration that attest to the vital law enforcement interests at stake in this proceeding. It is imperative for the Commission to keep these interests firmly in mind -- not simply because they are intrinsically important, but because they are the interests that led Congress to enact CALEA in the first place. By following through on the changes proposed in the Further Notice of Proposed Rulemaking, the Commission will be vindicating Congress's underlying goals, and discharging the Commission's own responsibilities under CALEA, at the same time that it is protecting the public interest in effective law enforcement.

DISCUSSION

Introduction

The Department of Justice and the Federal Bureau of Investigation submit these reply comments pursuant to the Commission's Further Notice of Proposed Rulemaking (Notice) in this proceeding. These reply comments are submitted in response to the comments filed by other parties on December 14, 1998, concerning the tentative conclusions and questions set forth by the Commission in its Notice.

Perhaps unsurprisingly, the latest round of comments from industry and other commenters bears a strong resemblance to the comments filed by the same parties in May 1998 and June 1998, in response to the Commission's initial public notice. To the extent that the latest set of filings merely repeats prior comments, we have attempted to avoid repeating our own prior remarks unnecessarily. Instead, where possible, we have identified the relevant portions of our earlier filings and refer the Commission to the referenced materials for a more complete explanation of our position.

The comments that follow are divided into three parts. In Part I, we reply to general comments from other parties concerning Section 103(a) of CALEA, which prescribes electronic surveillance assistance capability requirements for telecommunications carriers, and Section 107(b) of CALEA, which prescribes the Commission's role in identifying and correcting deficiencies in industry "safe harbor" technical standards. Among other things, we address the general policies that underlie CALEA, the role of cost considerations in this proceeding, and the general scope of the carriers' obligation to provide law enforcement with reasonably available call-identifying

information. The issues discussed in Part I are germane to each of the individual assistance capabilities at issue in this proceeding.

In Part II, we reply to comments concerning the individual assistance capabilities at issue in this proceeding. We address both the assistance capabilities that the government is seeking to add to J-STD-025 (the "J-Standard") and the existing capabilities in the J-Standard that CDT and other privacy groups are seeking to restrict. Finally, in Part III, we reply to comments concerning the implementation of the Commission's forthcoming order. In particular, we address issues relating to the proposed "remand" to TIA and the deadline for implementing the assistance capability requirements established in this proceeding.

In conjunction with these reply comments, we are submitting declarations of Louis J. Freeh, Director of the Federal Bureau of Investigations, and Thomas A. Constantine, Administrator of the Drug Enforcement Administration. FBI Director Freeh and DEA Administrator Constantine address the issues before the Commission from the perspective of the federal government's most senior law enforcement officials. They explain not only the general importance of electronic surveillance to law enforcement, but also law enforcement's particular need for the assistance capabilities at issue in this proceeding. See, e.g., Freeh Dec. ¶¶21(A)-21(H). These declarations answer the recurring suggestion by other commenters that the capabilities being sought in this proceeding are relatively inconsequential for law enforcement -- mere "dessert," as one commenter puts it (CTIA Comments at 5).

We also present a declaration by FBI Supervisory Special Agent Dave Yarbrough. Mr. Yarbrough's declaration discusses the assistance capability issues in this proceeding from the perspective of a law enforcement agent who has extensive personal experience in legally authorized

electronic surveillance. Mr. Yarbrough's declaration reviews each of the "punch list" items before the Commission, explaining for each item law enforcement's traditional capabilities in the POTS (Plain Old Telephone Service) environment, the effect of intervening technological changes on those capabilities, and the consequences of omitting the punch list item from the J-Standard.

Finally, we present a declaration by John W. Cutright, an FBI electronics engineer. Mr. Cutright's declaration addresses various technical issues that have been identified in other parties' comments. His declaration provides background information regarding the structure of the Public Switched Telephone Network (PSTN) and the technological changes that the PSTN is currently undergoing. Against that background, he discusses each of the "punch list" items from a technical perspective and addresses technical points raised by the other commenters.

I. General Comments

A. The Basic Policies of CALEA

Many commenters argue that, at the most general level, the Commission's tentative conclusions regarding the deficiencies in the J-Standard are at odds with the basic policies of CALEA. These arguments take several forms. Some commenters argue that CALEA was intended to "preserve the status quo" and that, insofar as the Commission's tentative conclusions would make it possible for law enforcement to carry out surveillance orders that it was previously unable to execute, the Commission is ignoring Congress's supposed status-quo goal. Other commenters argue that Congress intended for CALEA's assistance capability requirements to be construed narrowly, and that the Commission's tentative conclusions are not faithful to that mandate. Still other commenters argue that the Commission is failing to perform its obligations under Section 107(b) by

restricting its attention to the provisions of the J-Standard that have been placed in dispute and not reviewing, or otherwise taking account of, the J-Standard's uncontested provisions.

These comments reflect fundamental errors regarding the policies underlying CALEA and the responsibilities of the Commission in giving effect to the statute. We have addressed the basic policies of CALEA at length in our earlier filings, and we encourage the Commission to review those filings for a complete discussion of CALEA's policies. See Government Petition at 11-19; Government June Reply Comments at 3-11. In response to the charges that the Commission has set itself at odds with the policies embodied in CALEA, a few additional remarks are in order.

The argument that the Commission is flouting Congress's "status quo" objective rests on a misunderstanding of the "status quo" that Congress meant to preserve. As we have explained in detail in our earlier filings, the legislative history of CALEA makes clear that Congress wished to leave unchanged law enforcement's legal authority to carry out electronic surveillance. See Government June Reply Comments at 7-10. There is no indication, however, that Congress also meant to leave unchanged law enforcement's technical capability to engage in legally authorized electronic surveillance. To the contrary, CALEA was enacted precisely because technological changes were driving a growing wedge between what law enforcement was legally authorized to do and what it was technically able to do. Far from simply freezing the "status quo" regarding law enforcement's technical capabilities, CALEA represents an unprecedented mandate to close the gap by requiring industry to bring those capabilities into line with the scope of existing legal authorization. See, e.g., House Report at 12, reprinted in 1994 USCCAN at 3492 (CALEA is intended, inter alia, to deal with "impediments to authorized wiretaps, like call forwarding, [that] have long existed in the analog environment").

It should be added that if the relevant standard under CALEA were the preservation of law enforcement's traditional technical surveillance capabilities, that would argue strongly in favor of most of the assistance capabilities that are at issue in this proceeding. For example, law enforcement traditionally has had the capability to detect "post-cut-through" dialed digits by monitoring the local loop between the subscriber's terminal and his carrier's central office. See Yarbrough Dec. ¶¶ 53-54. As we have explained before, and as we discuss further below, the J-Standard manifestly fails to preserve this capability. If traditional capability is the benchmark, the debate over post-cut-through digits must be resolved in the government's favor. More generally, any commenter who argues that CALEA was meant to guarantee law enforcement exactly the same capabilities that it has historically enjoyed is thus effectively, if unwittingly, conceding that the J-Standard must be modified in a number of important respects.[1]

The argument that the Commission has given an impermissibly "broad" reading to CALEA, rather than a "narrow" reading, is equally misconceived. In each case where the Commission has tentatively concluded that the J-Standard is deficient, the Commission's conclusion is entirely consistent with the language, legislative history, and policies of CALEA. See pp. 21-30, 32-34, 40-43, 44-45, 49-50 infra; see also Government December Comments at 37-38, 44-45, 48-49, 52-53, 54-56, 66-67. All too often, the commenters use "broad" and "narrow" as terms of opprobrium and encomium, rather than engaging in a close consideration of the legal issues. Simply labeling the Commission's reading of CALEA as "broad" does nothing to advance the legal analysis.

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[1] As noted above, the Yarbrough declaration contains a full discussion of law enforcement's traditional electronic surveillance capabilities. We refer the Commission to this discussion in connection with the claims by various commenters that one or another "punch list" item exceeds law enforcement's traditional capabilities.

Finally, the Commission is acting entirely properly in directing its attention to the portions of the J-Standard that have been called into question by the several rulemaking petitions here, rather than embarking on an omnibus review of the J-Standard as a whole. Contrary to the suggestion of commenters like EPIC, the Commission is not "foreclosing" challenges to other portions of the J-Standard when it confines itself in this proceeding to the specific provisions of the J-Standard that the petitioning parties have placed in controversy. Any person may invoke the Commission's rulemaking authority under Section 107(b) by filing a petition that identifies deficiencies in an industry "safe harbor" standard. See 47 U.S.C. § 1006(b) (petition may be filed by "a Government agency or any other person"); House Report at 18, reprinted in 1994 USCCAN at 3498 (CALEA "[a]llows any person, including public interest groups, to petition the FCC for review of standards implementing wiretap capability requirements"). If EPIC or anyone else believes that the J-Standard has deficiencies other than those that have been identified thus far, they are perfectly free to seek redress by filing their own petitions under Section 107(b). They have not done so. In the absence of additional petitions, nothing requires the Commission to search for controversies where none yet exist.

B. Cost Considerations

The Commission's Notice raises a variety of questions relating to the role of cost considerations in this proceeding. In our comments, we responded to these questions at length. See Government December Comments at 8-18. In response to the Commission's inquiries, the industry commenters offer a welter of cost-related assertions. Unfortunately, these assertions suffer from both legal and factual shortcomings.

1. As we have pointed out in our earlier comments, any consideration of the costs associated with CALEA's assistance capability requirements must take careful account of the statutory context of this proceeding. See Government December Comments at 8-15. Section 107(b) of CALEA is designed to bring carriers into compliance with CALEA's assistance capability requirements, by eliminating deficiencies in industry standards that would otherwise constitute a "safe harbor" under Section 107(a). The Commission's task under Section 107(b) is two-fold: first, it must determine whether the J-Standard is deficient, and second, it must develop modified standards that correct any identified deficiencies.

Cost considerations have no role to play in the first of these two tasks. For reasons explained in our earlier comments, the scope of CALEA's assistance capability requirements does not turn on the costs of implementing those requirements. See Government December Comments at 9-15. Congress recognized that meeting CALEA's assistance capability requirements might be prohibitively expensive for individual carriers, but its response was not to pare these requirements down to accommodate carriers for which compliance would be particularly expensive, but rather to permit individual carriers to seek relief under Section 109(b). As a result, the Commission can and should determine whether the J-Standard is deficient, in the first instance, without determining the costs entailed in correcting the deficiencies.

Cost considerations do have a role to play in the second stage of the Commission's deliberations under Section 107(b), but only a limited role. Once it has identified deficiencies in the J-Standard, the Commission must correct these deficiencies by developing new standards that: (i) meet the assistance capability requirements of Section 103 by cost-effective methods; (ii) protect the privacy and security of communications not authorized to be intercepted; (iii) minimize the cost

of compliance on residential ratepayers; (iv) serve the policy of encouraging the provision of new technologies and services to the public; and (v) provide a reasonable time and conditions for compliance with and the transition to any new standard. 47 U.S.C. § 1006(b). These provisions make cost considerations relevant in determining how identified deficiencies in the J-Standard are to be corrected. They do not, however, make cost a basis for determining whether deficiencies are to be corrected. See Government December Comments at 11-13. Congress has already resolved the question of whether the Commission must correct identified deficiencies, by mandating that the Commission's technical standards "meet the assistance capability requirements of section 1002 of this title [Section 103 of CALEA]." Id. § 1006(b)(1).

Within this statutory framework, comparative cost information -- i.e., information about the relative costs of alternative methods of correcting deficiencies in the J-Standard -- may well be relevant to the Commission's task. For example, if the Commission found itself presented with two alternative means of correcting a particular deficiency, one of which was appreciably less expensive than the other but equally effective, the Commission might well choose the less expensive alternative as the more "cost-effective method" (47 U.S.C. § 1006(b)(1)) of meeting CALEA's assistance capability requirements. By the same token, choosing the least expensive method of curing a deficiency may tend to "minimize the cost of * * * compliance on residential ratepayers" (id. § 1006(b)(3)). But in the absence of comparative cost information, assertions that a particular capability is "costly" or "expensive" are not legally germane under Section 107(b).

The cost estimates offered by the industry commenters simply fail to take account of this legal framework. Even if the industry cost estimates could be considered reliable (and, as we discuss

below, they cannot), they suffer from three legal flaws, each of which makes them unsuitable as a basis for the Commission's deliberations.

First, most of the industry cost estimates are not directed at the incremental cost of implementing the additional assistance capabilities that are the subject of this proceeding. Instead, many industry commenters discuss the cost of implementing the J-Standard, either on their own networks (GTE Comments at 7; BellSouth Comments at 2; AT&T Comments at 28; Nextel Comments at 22) or across the entire industry (CTIA Comments at 2; SBC Comments at 5). The Commission has already made plain that the unchallenged portion of the J-Standard is not at issue in this proceeding (see Notice ¶ 45), and properly so. The costs that carriers will incur in implementing undisputed assistance capability requirements are no more germane to this proceeding than any other costs that carriers are legally obligated to bear, such as the costs of complying with federal securities laws or occupational safety and health laws. Nothing in Section 107(b) authorizes the Commission to excuse carriers from the costs of satisfying undisputed statutory mandates on the ground that compliance would be "too expensive." When commenters complain about "the CALEA surcharge" (CTIA Comments at 18), or argue that CALEA compliance will be particularly expensive for wireless carriers (Bell Atlantic Mobile Comments at 9), their complaints should be directed to Congress, not to the Commission. Thus, the costs of complying with the undisputed assistance capability obligations incorporated in the J-Standard cannot legitimately justify the failure to correct identified deficiencies in the J-Standard, and estimates of those costs have no proper role to play in this proceeding.

Second, the industry cost estimates that are directed at the cost of the punch list items tend to address those costs in the aggregate, rather than attempting to identify the costs associated with

individual capabilities. Several commenters proffer estimates of carrier-specific or industry-wide costs of implementing the entire punch list (SBC Comments at 5; AirTouch Comments at 13), or the J-Standard plus the entire punch list (USTA Comments at 8).[2] But the Commission's task is not to make an "all or nothing" choice between adding the punch list in toto or leaving the J-Standard unchanged. Instead, the Commission must decide whether each individual capability identified in the government's rulemaking petition should be added to the J-Standard.[3] Estimates of the aggregate cost of implementing all of the punch list capabilities are irrelevant to the Commission's task in determining whether to add individual capabilities to the J-Standard.

Finally, in the few instances where commenters have attempted to provide cost estimates for individual punch list items, they have made no attempt to identify any less expensive alternatives for correcting the deficiency at which the item is directed. For example, the commenters that refer to the hardware costs that could be incurred in connection with detecting post-cut-through dialing (USCC Comments at 10; SBC Comments at 6; AirTouch Comments at 13) make no effort to show that the underlying deficiency in the J-Standard could be corrected in a more "cost-effective" manner than we have suggested. Tellingly, one commenter concedes that, unless the Commission radically alters its tentative conclusions and decides that the J-Standard has no deficiencies at all, the addition or removal of particular punch list items will not substantially affect the carriers' compliance-related

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[2] It is not entirely clear whether USTA's estimate addresses the costs associated with the J-Standard, or the J-Standard plus the punch list.

[3] At least one carrier appears to understand this point, when it notes that the kind of cost information that could be useful to the Commission would be a "breakdown of the costs of individual punch list items or other capabilities." US West Comments at 4.

costs. See BellSouth Comments at 6 ("the Commission's selective pruning of punch list items will not substantially reduce carriers' capital and expense costs").

In sum, as a legal matter, the industry cost comments are far more significant for what they do not say than for what they do say. If the carriers had information demonstrating that an alternative method of curing a particular deficiency would be more "cost-efficient" than the corresponding method suggested by law enforcement, the carriers presumably would have provided the Commission with this information. They have not.

It makes no sense for telecommunications carriers to suggest in their comments that the government bears the burden of demonstrating that its proposed means of correcting the J-Standard's deficiencies are more "cost-effective" than any conceivable alternative means of curing those deficiencies. See, e.g., US West Comments at 4. The carriers themselves are obviously the parties most familiar with the deployment costs associated with meeting CALEA's assistance capability requirements, for it is the carriers that deploy new features on the nation's telecommunications networks.[4] Yet, with minor exceptions, these commenters have failed to identify any alternative methods of correcting the J-Standard's deficiencies. In the absence of a showing that workable alternatives exist, there is simply nothing with which to compare the costs of the punch list items,

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[4] The manufacturers are the parties most familiar with the costs of developing, as distinct from deploying, CALEA solutions. We understand that several manufacturers have submitted cost information to the Commission, accompanied by requests for confidential treatment under 47 C.F.R. § 0.459. The Commission's general policy is not to accord confidential treatment to materials submitted in rulemaking proceedings. See Report and Order, In the Matter of Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, GC Docket No. 96-55, ¶¶ 43-44 (released Aug. 4, 1998). If the Commission decides to depart from that general policy in this case, it should permit interested parties to examine the manufacturer submissions pursuant to an appropriate protective order. See id. ¶ 45.

and no basis for arguing that the punch list items are not "cost-effective methods" of satisfying the requirements of Section 103.

2. For the foregoing reasons, even if the cost estimates submitted by the industry commenters were factually accurate, they would not provide the Commission with any legal basis for failing to correct deficiencies in the J-Standard. Having said that, we add that the commenters' cost estimates appear to be grossly overstated. A brief explanation of the process for achieving CALEA compliance will help to explain why.

The features required for a carrier to meet its CALEA assistance capability obligations will be among many features contained in one or more periodic "releases" deployed on the carrier's switches. These releases, which consist primarily of software but may include hardware elements as well, are purchased by carriers from switch manufacturers and are analogous to software releases used in personal computing, like the "Windows 98" release of Microsoft's operating system replacing the "Windows 95" release. Like ordinary business software releases, telecommunications switch releases are an entrenched element of the business cycle, rather than an unusual event -- i.e., most carriers will purchase periodic releases from the switch manufacturers regardless of what happens in this proceeding, and would have done so even if CALEA had never been enacted. The only impact that this proceeding may have on that process is that it may cause particular releases to include one or more features designed to cure deficiencies in the J-Standard. The costs attributable to CALEA are only those that will be added to the costs of the regular release process by the addition of the CALEA features.

The essential process of deploying a release is the same, regardless of the particular features included in it. As a result, the addition of "punch list" features is not likely to cause significant cost

increments in the process of deploying switch releases. This is consistent with BellSouth's acknowledgment, noted above, that the addition of individual punch list items will not give rise to "substantial" marginal costs for the carriers. BellSouth Comments at 6.

Several commenters do proffer estimates of the overall costs, including the costs of purchasing the necessary releases and deploying them on a particular network or across portions of the industry, of the J-Standard. For example, GTE claims that the cost of implementing the J-Standard for its wireline and wireless companies will exceed $400 million, and that sundry other improvements could add another $300 to $400 million. GTE Comments at 7. BellSouth estimates its cost of complying with the J-Standard at $388 million or more. BellSouth Comments at 2. AT&T Wireless Services, Inc. estimates its cost of complying with the J-Standard at over $35 million. AT&T Comments at 28. USTA estimates the aggregate compliance cost for its member companies (either for the J-Standard or for the J-Standard plus the punch list) at $2.2 to $3.1 billion. USTA Comments at 8. CTIA offers the most lurid estimate, claiming that the industry-wide cost of implementing the J-Standard could be as much as $5 billion. CTIA Comments at 2 ("the hardware and software costs of implementing the industry's standard alone is as much as ten times what Congress authorized the Attorney General to spend [i.e., $500 million] when it passed CALEA in 1994").

Even if the Commission were to determine that these estimates were relevant to its statutory mandate, the Commission would be well advised to approach them with a healthy measure of skepticism. Although the commenters' general lack of explanation and detail make it impossible for us to identify all of the questionable assumptions underlying their numbers, we can discern from the

little that they do say, and from the sheer magnitude of their cost assertions, that their estimates appear to reflect several crucial errors and inappropriate assumptions:

* The carriers may be basing their cost assertions on extremely unrealistic estimates of the price they will pay manufacturers for CALEA solutions. None of the carriers claims to have actually completed price negotiations with the manufacturers of their switches, and their comments suggest that, for the most part, these negotiations have not yet even begun. See USCC Comments at 7; AT&T Comments at 26; GTE Comments at 8; CTIA Comments at 8; Nextel Comments at 23. Because the market has not yet set the actual prices of the CALEA features, the carriers are free essentially to pluck their price estimates from the air, or to proffer the prices "quoted" to them by the manufacturers (BellSouth Comments 6) as though they were the actual price to be paid for these features. In reality, of course, the quoted prices are merely the beginning of a negotiation process, and it is general industry practice for carriers to be given substantial discounts, of as much as 65% or more, from those prices.

* Carriers may be attributing to CALEA the entire deployment cost associated with incorporating the release or releases that will include the CALEA features into their networks. Cf. Bell Atlantic Comments at 14; BellSouth Comments at 4. As we have explained above, carriers generally would be deploying these releases even if CALEA had never been enacted, and thus the relevant cost is only the added deployment cost associated with the presence of the CALEA features in one or more releases.

* The carriers may be including in their estimates all of the costs associated with CALEA's capacity requirements. Cf. SBC Comments at 6; USTA Comments at 8; GTE Comments at 7. Most of these costs are to be reimbursed by the government (see 47 U.S.C. § 1003(e)), and therefore do not represent "costs" to the industry. Moreover, the carriers may be vastly overstating these costs by estimating the cost of providing the county-wide aggregate capacity requirements on every switch within each county. Cf. USTA Comments at 8. These county-wide aggregate requirements, however, are just that: they represent the aggregate capacity that a carrier must make available within the specified county, not the capacity that must be provided on every switch within the county. See 63 Fed. Reg. 12,218, 12,235 (1998).

* The carriers may base their estimates on the premise that compliance solutions must be incorporated into every switch in their networks. For many platforms, however, compliance solutions need only be incorporated into the subset of "host" and "stand-alone" switches, not into "remote" switches. For these platforms, remote switches essentially share the brains of host and stand-alone switches, and thus if the CALEA features are available at a host or stand-alone switch, they are also available at any interlinked remote switches.

* Carriers may be singling out the types of switch that will be most expensive and difficult to bring into compliance with CALEA, leading to an incorrect inference that the costs associated with such switches are representative of the broader costs of compliance in the industry. See AirTouch Comments at 13 ("In one case, the punch list software releases would cost nearly twice as much as the J-STD-025 software release") (emphasis added).

* Carriers may be describing the special hurdles to compliance that would be faced by small, rural telephone companies using unsophisticated switches, overlooking the fact that such a carrier's switches are very likely to have been installed or deployed before January 1, 1995, and thus to be "grandfathered" pursuant to Section 109 such that the government would reimburse any compliance costs (unless they are "replaced or significantly upgraded or otherwise undergo[] major modification)." 47 U.S.C. § 1008(d); cf. USTA Comments at 8.

* Carriers may be attempting to ascribe to CALEA a variety of costs that they would sustain even in the absence of CALEA, including ongoing network management costs and the costs of conducting wiretaps. Cf. Nextel Comments at 24; AT&T Comments at 29; GTE Comments at 7 n.13.

* Carriers may be counting costs associated with features that law enforcement is not seeking in this proceeding. See SBC Comments at 6 (singling out the cost of "separated delivery," a feature that the government's rulemaking petition does not seek).

3. In addition to proffering generalized assertions about the costliness of CALEA compliance, a few commenters warn that meeting CALEA's assistance capability obligations could dramatically affect consumer demand for telecommunications services. CTIA asserts that the price elasticity of demand for wireless service is -0.51, and argues that this means that "for each dollar increase in the price for services, there will be a corresponding, negative impact of more than 50% in demand." CTIA Comments at 15. This claim is off by almost two orders of magnitude. The price elasticity of demand coefficient represents the percentage by which demand will fall in

connection with a one percent increase in price. See Paul A. Samuelson & William D. Nordhaus, Economics 65 (14th ed. 1992). Thus, if the price elasticity of demand were -0.51, a one percent increase in the price would bring about a decline in demand of just over one-half of one percent.

At any rate, there is no basis for the assertion that requiring any or all of the punch list items would have a discernible impact upon telecommunications markets, particularly if no individual punch list item would "substantially" affect the carriers' capital and expense costs (BellSouth Comments at 6). The carriers do not reveal the methodology by which they determine that ratepayers will face any — much less "enormous" (GTE Comments at 9) — new burdens as a result of the addition of the punch list items to the J-Standard. See AT&T Comments at 29; CTIA Comments at 13. But it is difficult to see what conceivable methodology would support such an assertion. Currently, there are approximately 163 million switched access lines and approximately 70 million cellular and PCS subscribers in the United States. Even accepting CTIA's worst-case scenario of $5 billion in industry-wide compliance costs to implement the J-Standard, if the industry spreads these costs over only a five-year period, the resulting increase in the average ratepayer's monthly bill would amount to just under 36 cents. And that assumes that the industry will pass along every dollar of additional costs to consumers, rather than absorbing a portion of the costs out of the industry's many billions of dollars of annual profits.

In summary, we reiterate that information regarding the costs of CALEA compliance is relevant to this proceeding only insofar as it can assist the Commission in selecting the methods of curing any deficiencies in the J-Standard that are "cost-effective," and that "minimize" the burden of compliance on residential ratepayers. 47 U.S.C. § 1006(b)(1), (3). Very little of the cost-related information that the industry commenters have submitted is relevant to this statutory mandate, and

although we have attempted to alert the Commission to likely factual errors in the carriers' estimates, we urge the Commission simply to set aside any cost-related assertions not directly relevant to its statutory responsibilities.

4. In our earlier comments, we noted that manufacturers have provided the government with CALEA price information (as distinct from cost information) pursuant to non-disclosure agreements. Government December Comments at 16. Some commenters argue that this information is relevant to this proceeding and the government therefore should disclose it to the Commission and the other commenters. See U S West Comments at 5; CTIA Comments at 7.

The price information that we have received from manufacturers is not broken down by individual "punch list" items, nor does it identify the relative costs of alternative means of curing the deficiencies identified in the J-Standard. Thus, for the reasons explained above, it is not relevant to the factors enumerated in Section 107(b). In any event, we cannot release this information to the Commission or to the other parties in this proceeding because the non-disclosure agreements preclude us from doing so. Although the commenters invite us to release the information in aggregated form, we have reviewed the non-disclosure agreements and have determined that the release of the information even in aggregated form could reasonably be claimed to violate the agreements. The same limitations preclude us from providing, as several commenters demand, the confidential manufacturer information underlying the CALEA implementation report that was presented by the Attorney General to Congress last year. See Government June Reply Comments at 36 n.21.

C. The Obligation to Deliver Call-Identifying Information

Section 103(a)(2) of CALEA obligates a carrier to ensure that its equipment, facilities, and services are capable of "expeditiously isolating and enabling the government, pursuant to a court order or other lawful authorization, to access call-identifying information that is reasonably available to the carrier * * * ." 47 U.S.C. § 1002(a)(2). Many of the comments take issue with the Notice regarding the scope of this statutory obligation. In some instances, commenters argue that information that the Commission has tentatively held to be required by Section 103(a)(2) does not constitute "call-identifying information." In other instances, commenters argue that the information is not "reasonably available," and therefore is outside the scope of Section 103(a)(2) even if it does constitute call-identifying information.

To the extent that these arguments are confined to specific assistance capability items, we address them in Part II below, in connection with our discussion of those items. To a considerable extent, however, the commenters' arguments raise more general issues regarding the meaning and scope of CALEA's provisions regarding call-identifying information. We address those general issues here.

1. CALEA contains an explicit and comprehensive definition of "call-identifying information": "dialing or signaling information that identifies the origin, direction, destination, or termination of each communication generated or received by a subscriber by means of any equipment, facility, or service of a telecommunications carrier." 47 U.S.C. § 1001(2). We set out this statutory definition at the outset because many of the commenters simply disregard it. They present arguments about the meaning of "call-identifying information" that make no reference to, and are inconsistent with, the actual terms of the definition that Congress incorporated into CALEA.

It is therefore vital to look to the actual statutory definition as the Commission sorts through the commenters' arguments.

Rather than address the definition of "call-identifying information" prescribed by CALEA, many of the commenters turn to a passage in the House Report that discusses the subject of call-identifying information. See, e.g., CTIA Comments at 21 (quoting House Report at 21, reprinted in 1994 USCCAN at 3501); PCIA Comments at 8 (same). As a general matter, when a statutory term is expressly defined in the statute itself, the Commission should not disregard the explicit terms of the statutory definition in favor of language in a committee report. In this case, that general principle takes on added force in light of one critical fact: the quoted passage in the House Report reflects an earlier version of the legislation, one that employed a different definition from the one ultimately adopted by Congress. As a result, it is an unreliable guide to the meaning of the definition that is actually embodied in CALEA.

As we have explained in previous filings, the bill that evolved into CALEA originally referred to "call setup information," which was defined as "the information generated which identifies the origin and destination of a wire or electronic communication placed to, or received by, the facility or service that is the subject of the court order or lawful authorization * * * ." Digital Telephony and Law Enforcement Access to Advanced Telecommunications Technologies and Services: Joint Hearings before the Subcomm. on Technology and the Law, Senate Comm. on the Judiciary, and Subcomm. on Civil and Constitutional Rights, House Comm. on the Judiciary, 103d Cong., 2d Sess. 267-68 (Aug. 11, 1994). Relatively late in the legislative process, Congress replaced "call setup information" with "call-identifying information." In so doing, it adopted a revised definition that both clarified and expanded the scope of the information covered by the term. See

Government June Reply Comments at 31-32. For example, the definition of "call setup information" covered only the "origin" and "destination" of communications; the definition of "call-identifying information" covers not only "origin" and "destination," but also "direction" and "termination." 47 U.S.C. § 1001(2).

It is this revised and expanded definition that Congress adopted when it enacted CALEA. The cited passage in the House Report, however, recites verbatim the superseded definition of "call setup information": "information generated that identifies the origin and destination o[f] a wire or electronic communication placed to, or received by, the facility or service that is the subject of the court order or lawful authorization." House Report at 21, reprinted in 1994 USCCAN at 3501. Whether from oversight or inertia, the committee staff who drafted the report simply failed to reflect the changes to the statutory definition that Congress ultimately approved. Because the report is written in terms of a definition that had been superseded by the time CALEA became law, the language in the report cannot be treated mechanically as a proxy for the definition actually adopted and written into law by Congress.

2. Many commenters argue that various kinds of information are outside the scope of Section 103(a)(2) because they do not constitute call-identifying information "from the perspective of," or "for," or "as to," particular carriers. This line of argument is central, for example, to the commenters' discussion of post-cut-through dialed digits. The commenters argue that because originating carriers do not use post-cut-through DTMF (Dual-Tone Multi-Frequency) tones for the purpose of routing outgoing calls, post-cut-through dialing does not constitute call-identifying information "for," or

"from the perspective of," originating carriers, even when the dialed digits identify the number of the party that the subject is trying to reach. See, e.g., TIA Comments at 40.

The same kind of argument underlies CDT's position regarding packet mode communications. See CDT Comments at 13-31. CDT asserts that call-identifying information is a "subjective" or "relative concept" that depends on "the perspective of the particular telecommunications carrier upon which an interception order is served." Id. at 23, 25, 29. According to CDT, information in a packet header constitutes "call-identifying information" only if it is information that the carrier carrying out the surveillance order uses to route the packet through its network. Even if the information is used for routing purposes by another carrier, the information does not (in CDT's view) constitute call-identifying information "for" the carrier that is performing the surveillance. Thus, CDT argues that a carrier is obligated under Section 103(a)(2) to provide law enforcement only with "the transactional information [in packet headers] that it uses to process communications," not "the transactional information used by other carriers." Id. at 13 (emphasis in original).

The central problem with these arguments is that they ignore the actual language of CALEA. Neither the statutory definition of "call-identifying information" nor the terms of Section 103(a)(2) limit a carrier's obligation to the delivery of call-identifying information that is used by the carrier itself, as opposed to another carrier, for purposes of call processing.

As noted above, CALEA defines "call-identifying information" to mean "dialing or signaling information that identifies the origin, direction, destination, or termination of each communication generated or received by a subscriber by means of any equipment, facility, or service of a telecommunications carrier." 47 U.S.C. § 1001(2). This definition manifestly is not "subjective"

or "relative," as CDT would have it. Nowhere does it ask whether dialing or signaling information is used by the particular carrier in question to route the communication. Instead, as long as dialing or signaling information "identifies the origin, direction, destination, or termination" of a "communication generated or received by a subscriber," it is "call-identifying information" -- period. Thus, for example, post-cut-through digits that are dialed by a subscriber to identify the number of the party whom the subscriber is trying to reach constitute "call-identifying information" because they are "dialing or signaling information that identifies the destination" of a "communication generated * * * by a subscriber." There simply is no room in the statutory definition to exclude such information based on the use to which it is put by a particular carrier.[5]

The language of Section 103(a)(2) is equally inhospitable to the commenters. By its terms, Section 103(a)(2) obligates a carrier to provide the government with access to all "call-identifying information that is reasonably available to the carrier." If Section 103(a)(2) instead provided that a carrier is obligated to provide "call-identifying information that is reasonably available to the carrier and is used by the carrier to route the call," then the commenters' argument would have force. But the underscored words are not found in 103(a)(2); the commenters are simply asking the Commission to proceed as if they were. The actual language of Section 103(a)(2) makes clear that

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[5] It is worth noting that if the commenters' theory were correct, it would encompass not only post-cut-through dialing, but also many kinds of pre-cut-through dialing. For example, when a subscriber dials a conventional inter-LATA long-distance call ("1-918-123-4567"), the originating carrier uses only the first few digits ("1-918") for purposes of routing the call to the subscriber's IXC. The commenters' theory implies that the originating carrier therefore could satisfy its obligations under CALEA by providing law enforcement with only a portion of the called party's number -- an obviously absurd result.

a carrier's obligation applies to all reasonably available call-identifying information, regardless of whether the carrier itself uses the information for call routing purposes.[6]

CDT and other commenters quote a statement in the House Report that "[f]or voice communications," call-identifying information is "typically" information that "identif[ies] the numbers dialed or otherwise transmitted for the purpose of routing calls through the telecommunications carrier's network." House Report at 21, reprinted in 1994 USCCAN at 3501. The commenters reason that this statement excludes information that is transmitted for the purpose of routing telephone calls through other carriers' networks. But the quoted language does not purport to be exhaustive; by its terms, it merely describes the "typical" case, not all cases. It therefore is entirely consistent with the application of Section 103(a)(2) to call-identifying information (such as post-cut-through dialed digits) that is transmitted through one carrier's network in order to be used for call routing by another carrier.

3. Section 103(a)(2) obligates a carrier to provide law enforcement with access to all call-identifying information that is "reasonably available to the carrier." 47 U.S.C. § 1002(a)(2). Predictably, the industry commenters argue that much of the call-identifying information at issue in this proceeding is not reasonably available. A few of the more ambitious commenters, such as TIA, go so far as to claim that none of the information is reasonably available. See, e.g., TIA Comments at 24 ("All of the call-identifying information sought by the FBI in this proceeding is not reasonably available").

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[6] For reasons that we have discussed previously, Section 103(a)(2)'s "reasonably available" proviso does not excuse carriers from providing call-identifying information that is used by other carriers for call routing purposes. See Government December Comments at 23-24.

Many of these comments are predicated on the J-Standard's definition of "reasonably available," which provides that call-identifying information is deemed to be "reasonably available" only if it is "[1] present at an Intercept Access Point (IAP) [2] for call processing purposes." J-STD-025, § 4.2.1 (brackets added). In our comments, we reviewed this industry definition in considerable detail and identified several major shortcomings in it. See Government December Comments at 20-25. To the extent that the current round of industry comments rests on the J-Standard definition, we refer the Commission to our prior discussion.

In addition to invoking the J-Standard definition of "reasonably available," some industry commenters argue that the call-identifying information at issue here is not available at all in existing networks, and hence cannot be deemed "reasonably available." In reviewing this argument, it is vital for the Commission to understand one central point: all of the call-identifying information to which the government is seeking access in this proceeding is already present in one form or another within existing networks. For example, information about which parties are connected to a multi-party call over the course of the call is present within (and used by) the network elements that are handling the call. If it were otherwise, the network could not maintain the required connections and could not add and release network resources at the proper times. Similarly, when a subject presses feature keys or engages in other dialing and signaling activity during the course of a call, the carrier's switch receives the resulting signals that are generated by the subject's terminal equipment. The same thing is true with respect to post-cut-through dialing. And network-generated in-band and out-of-band signaling is, by definition, generated by (and hence present in) the network itself. Thus, carriers are not being called on to "create" call-identifying information that does not already exist.

The commenters try to obscure this point by arguing that the messages that are to be used in delivering the requested call-identifying information to law enforcement do not now exist. See, e.g., CTIA Comments at 25-26; Nextel Comments at 9. It is perfectly true that the specific messages discussed in the government's rulemaking petition, such as the proposed PartyJoin and PartyDrop messages (Government Petition, Appendix A, p.5), are not currently in use. But that is equally true of the messages contained in the J-Standard itself. Under the J-Standard, "call-identifying information is formatted into discrete messages using a specialized protocol" called the Lawfully Authorized Electronic Surveillance Protocol (LAESP). See J-STD-025, § 4.2.3. The LAESP and its constituent messages are defined by the J-Standard itself. See id. §§ 6.2.1-6.2.3, 6.3.1-6.3.10, 6.4.1-6.4.11. No carrier network currently generates these messages, and in the absence of CALEA, no network would do so. Instead, a carrier that wishes to avail itself of the J-Standard's safe harbor must modify its network to generate them. As the J-Standard itself recognizes, what matters for purposes of a carrier's obligations under Section 103(a)(2) is the reasonable availability of the underlying call-identifying information, not the presence or absence of pre-existing messages encapsulating that information in a particular form. The messages are "envelopes" for delivering call-identifying information; they are not the call-identifying information itself.

In a variation on the foregoing argument, several commenters argue that Section 103(a)(2)'s "reasonably available" language excuses a carrier from providing law enforcement with access to any call-identifying information if the carrier would have to modify its network equipment to do so. See, e.g., TIA Comments at 23-24; USTA Comments at 3. This argument is a breathtaking one, for it flies in the face of one of CALEA's fundamental principles: "telecommunications carriers * * * are required to design and build their switching and transmission systems to comply with the

legislated requirements." House Report at 18, reprinted in 1994 USCCAN at 3498 (emphasis added). CALEA was enacted precisely because Congress was not willing to consign law enforcement to whatever information a carrier might otherwise design its network to provide. If TIA were correct that carriers are under no obligation to modify their equipment to provide law enforcement with access to call-identifying information, there would have been no need for Section 103(a)(2) at all.

In an effort to support this argument, the commenters point to a passage in the legislative history that states that if call-identifying information "is not reasonably available, the carrier does not have to modify its system to make it available." House Report at 22, reprinted in 1994 USCCAN at 2502. But the quoted language offers no assistance to the commenters, for by its terms, it presupposes that the information in question "is not reasonably available" (emphasis added). If particular call-identifying information is reasonably available, nothing in this language excuses a carrier from its express statutory obligation to "ensure that its equipment, facilities, or services * * * are capable of * * * expeditiously isolating" the information and "enabling the government * * * to access" it. 47 U.S.C. § 1002(a)(2).

Finally, AT&T states that call-identifying information is not reasonably available to a carrier if it is associated with processing that takes place entirely within the subscriber's terminal or other equipment owned and maintained by the subscriber, and the carrier therefore "is not aware of it." AT&T Comments at 6; see also TIA Comments at 22 (call-identifying information is not "reasonably available" if it resides "in a portion of the network not accessible to a carrier," such as a PBX). We agree. We have never suggested, as TIA claims, that "reasonably available" means "available anywhere in any network." TIA Comments at 22 (emphasis added). Rather, the

information must be present in the carrier's own network. See Government December Comments at 25. We are not asking carriers to create information that cannot be found in their networks.

D. The Section 107(b) Criteria

As discussed above and in our earlier comments, Section 107(b) sets forth several criteria to be taken into account by the Commission in modifying deficient industry "safe harbor" standards. 47 U.S.C. § 1006(b)(1)-(5); see Government Petition at 59-63; Government December Comments at 27-28. Some of the commenters argue that these criteria form an additional hurdle (or series of hurdles) that law enforcement must surmount before it is entitled to have the Commission cure the deficiencies in the J-Standard. See, e.g., Nextel Comments at 21; PCIA Comments at 7-8; US West Comments at 2. Under this view, even if the Commission determines that the J-Standard is missing a capability required by Section 103, the Commission must leave that deficiency in place unless the Commission determines that eliminating the deficiency would "meet" the criteria of Section 107(b).

This argument radically misstates the purpose of Section 107(b) and the Commission's responsibilities under that provision. The fundamental purpose of Section 107(b) is to ensure that carriers meet the assistance capability requirements of Section 103, not to excuse carriers from meeting those requirements. If the Commission determines that the J-Standard is deficient in one or more respects, as it has already tentatively concluded, then the Commission must modify the J-Standard to eliminate those deficiencies. The language of Section 107(b) could hardly be any clearer on this point: if an industry standard is deficient, Section 107(b) directs the Commission to establish technical requirements or standards that "meet the assistance capability requirements of section 1002 of this title" (that is, Section 103 of CALEA). 47 U.S.C. § 1006(b)(1) (emphasis added). A Commission order in this proceeding whose provisions did not require carriers to "meet

the assistance capability requirements" of Section 103 would be in patent conflict with Section 107(b) itself.

As we explained in our earlier comments, the criteria of Section 107(b) are directed at how the Commission should cure identified deficiencies in industry safe-harbor standards, not at whether the Commission should cure such deficiencies. See Government December Comments at 11-12, 27-28. If the Commission identifies more than one workable means of eliminating a particular deficiency, then the criteria in Section 107(b) may and should inform the Commission's choice among the available alternatives. But the criteria provide no basis whatsoever for allowing a deficiency to remain uncorrected. To treat the statutory criteria as additional preconditions for relief would be to transform Section 107(b) from what Congress intended -- a means of correcting deficient industry standards -- into its diametrical opposite.

II. Comments Regarding Particular Assistance Capabilities

A. Conference Call Content

1. The Commission has tentatively concluded that Section 103(a)(1) of CALEA requires carriers to provide law enforcement with access to all content of subject-initiated conference calls supported by the subscriber's equipment, facilities, and services, including communications between parties on other legs of a conference call when the subject places those other legs on hold or drops off the call. Notice ¶¶ 77-78. In our comments, we agreed with this tentative conclusion and addressed various questions raised by the Notice in connection with this capability. See Government December Comments at 37-44.

Many commenters argue that when a subject places the other legs of a conference call on hold or hangs up, communications among the other participants fall outside the scope of the carrier's

assistance capability obligations under Section 103(a)(1). We have addressed this argument at length in our earlier filings, and we refer the Commission to our prior comments. By its terms, Section 103(a)(1) obligates a carrier to provide law enforcement with "all wire and electronic communications * * * to or from equipment, facilities, or services of a subscriber of such carrier." 47 U.S.C. § 1002(a)(1) (emphasis added). As we have explained previously, when a subscriber's service supports the ability of other participants in a conference call to continue to speak to one another when the subscriber places them on hold or hangs up, their conversations constitute "communications * * * to or from" the subscriber's "equipment, facilities, or services," and therefore come squarely within the scope of Section 103(a)(1). See Government June Reply Comments at 17-21; Government December Comments at 38-39.

PCIA argues that when parties on held legs of a conference call speak to each other, their communications are carried "through," rather than "to or from," the subscriber's equipment, facilities, and services. See PCIA Comments at 23. PCIA's reasoning appears to be that a communication is not carried "to or from" a subscriber's equipment, facilities, or services unless it is routed by the subscriber's switch to his terminal equipment. But if that were the case, then call forwarding would be outside the scope of CALEA: when call forwarding is activated, incoming calls are not routed to the subscriber's terminal, but instead are routed to another destination (in some cases, a destination served by an entirely different carrier). Yet the legislative history makes abundantly clear that call forwarding was one of the principal features that Congress intended to reach when it enacted CALEA. See House Report at 9, 20, reprinted in 1994 USCCAN at 3489, 3500. The statutory language readily accommodates this legislative goal, because a forwarded call is carried "to" and

"from" the subscriber's equipment, facilities, and services. Precisely the same thing is true of the held legs of conference calls supported by the subscriber's conference calling service.

2. Several commenters assert that so-called "meet me" conference service should be excluded from the scope of the Commission's ruling regarding delivery of conference call content. See Ameritech Comments at 6; AT&T Comments at 7-8; CTIA Comments at 24. In a meet-me conference, conference participants connect to a pre-arranged conference bridge using a directory number assigned to the bridge. Meet-me conference service is ordinarily provided on an "on demand" basis: a party that wishes to set up a meet-me conference contracts with the carrier in advance to make the conference bridge available for a specified number of participants at a particular time.

The commenters assert that meet-me conference service is outside the scope of a carrier's assistance capability obligations under Section 103. That argument, however, is repudiated by the J-Standard itself. The J-Standard treats meet-me conferences no differently from any other multi-party circuit mode communications for purposes of a carrier's obligations under Section 103. See J-STD-025, § 4.5.1, p. 20 (describing the manner in which "[t]he Circuit IAP * * * shall access a multi-party circuit mode communication (e.g., Three-Way Calling, Conference Calling, or Meet Me Conferences)" (emphasis added)).

The commenters argue that CALEA's assistance capability requirements apply only to the services of "subscribers," and that meet-me conference service is not a "subscriber-based" service because it is provided on demand to any party that makes the necessary arrangements in advance. But a party that contracts for meet-me conference service is no less a "subscriber," for purposes of CALEA, than a party that arranges for conventional conference calling service; the only difference

is the duration of the party's "subscription" for the service. In any event, the assistance capability requirements of Section 103 apply to all "equipment, facilities, or services that provide a customer or subscriber with the ability to originate, terminate, or direct communications." 47 U.S.C. § 1002(a) (emphasis added). Assuming for the sake of argument that a party who arranges for a meet-me conference is not a "subscriber," he necessarily qualifies as a "customer," and hence the equipment, facilities, and services associated with the meet-me conference come within the scope of the carrier's assistance capability obligations, as the J-Standard itself recognizes.[7]

3. Several commenters raise questions regarding the provisioning of conference call intercepts -- specifically, the number of call content channels (CCCs) that will be required to capture the content of "held" conference legs. See Airtouch Comments at 15; AT&T Comments at 7; CTIA Comments at 23; TIA Comments at 27. If a subscriber's service includes the capability for the parties on held legs of the conference call to speak to each other, law enforcement must provision two CCCs: one CCC for delivery of the contents of the held legs and one CCC for the contents of any concurrent communications between the subscriber and other parties.[8] Contrary to AirTouch's

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[7] In general, CALEA tends to use "subscriber" as a shorthand term for any person who is making use of the services of a telecommunications carrier. For example, the definition of "call-identifying information" speaks in terms of "communication[s] generated or received by a subscriber." 47 U.S.C. § 1001(2). No one would seriously suggest that the definition should be read to exclude communications by a subscriber's family members or (in the case of a corporate subscriber) the subscriber's employees. Similarly, in pen register cases, Section 103(a)(2) of CALEA excuses carriers from providing "information that may disclose the physical location of the subscriber." 47 U.S.C. § 1002(a)(2). It would be frivolous to suggest that this privacy provision was meant to protect only subscribers and not other persons who may use a subscriber's wireless handset.

[8] For example, if A (the subscriber) places B and C on hold in order to take an incoming call from D, then one CCC is required to capture the conversation between A and D and a second CCC is required to capture the conversation (if any) between B and C.

apparent assumption, no more than two CCCs will be required, because law enforcement is not seeking "separated delivery" of each leg of the conference call on a different CCC. As a result, AirTouch's concerns about "porting and trunking costs" (AirTouch Comments at 15) are substantially overstated.

AT&T asserts that the obligation to provide law enforcement with the held legs of subject-initiated conference calls should be conditional on adequate provisioning of CCCs by law enforcement. AT&T Comments at 7. We agree that if law enforcement has not arranged for adequate provisioning of CCCs, a carrier is under no obligation to deliver call content for which a CCC is unavailable. There is no need, however, for the Commission to address this point separately in its order. As a general matter, the J-Standard already provides that a carrier's obligation to provide access to call content is limited by CCC exhaustion. See J-STD-025, § 4.6.3. That limitation will apply to held legs of conference calls just as it applies to all other multi-party call scenarios in which more than one CCC is required.[9]

4. Bell Atlantic Mobile states that "[e]xisting technologies generally do not continue the connection after the subject terminates his or her connection to the call, yet the first punch list item would make that capability a requirement that all carriers must offer." Bell Atlantic Mobile Comments at 6. This comment reflects a basic misunderstanding of our position. As we have said on more than one occasion in this proceeding, if a carrier does not offer a particular service or feature

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[9] In the case of "meet me" conference service, law enforcement will provision a CCC for delivery of the contents of the conference call from the conference bridge to law enforcement's collection point. For Title III purposes, a meet-me conference bridge ordinarily will constitute a separate "facility" from the local switch associated with the subscriber's own directory number, and law enforcement therefore will be responsible for obtaining a new Title III order that covers the conference bridge.

to its subscribers, we are not asking the Commission to require the carrier to offer the service or feature simply so that law enforcement can monitor communications that would make use of it. If the conference calling service that a carrier makes available to its subscribers does not include the capability for other participants to continue to talk when the subscriber has left the call, then the carrier is under no obligation whatsoever to add that capability. Our position is far more limited: if the carrier does offer such a capability, then (and only then) CALEA obligates it to make the resulting communications available to law enforcement pursuant to appropriate legal authorization.

5. Finally, several commenters argue that Title III does not authorize law enforcement to intercept the remaining legs of a conference call when the subject places the legs on hold or hangs up. See, e.g., EPIC Comments at 20-22; PCIA Comments at 23-24; TIA Comments at 26; US West December Comments at 11-12. The short answer to these arguments is that they raise legal issues that are beyond the scope of this proceeding. The Commission has made clear that its task is not to "define the scope of authorizations needed by LEAs to intercept or obtain call content or call-identifying information," but rather to determine "what capabilities each carrier must provide if and when presented with a proper authorization or court order to expeditiously provide LEAs access to call content and call-identifying information." Notice ¶ 33 (emphasis added). As the Commission has recognized, it only needs to decide what assistance capabilities are required by Section 103(a) of CALEA, not what legal authorization must be in hand for law enforcement to avail itself of those capabilities, or in what circumstances the requisite authority may be obtained.

Even if the commenters' Title III arguments were relevant to the assistance capability issues now before the Commission, they would fail to carry the day, for they rest on a series of misunderstandings regarding the scope and operation of Title III. We have discussed these

shortcomings at length in our earlier comments. See Government June Reply Comments at 21-30. The commenters' latest remarks require only a brief additional response.

Several commenters argue that law enforcement lacks authority to monitor the "held" legs of a conference call supported by the subscriber's services because, "once the subject of the warrant has dropped off the call, the carrier will be facilitating the warrantless electronic surveillance of the other parties on the conference call." PCIA December Comments at 23-24 (emphasis in original); see also TIA Comments at 26-27; EPIC Comments at 20-21. These commenters assume that Title III orders restrict law enforcement to the interception of calls in which a specified criminal suspect is participating. As we have explained previously, that assumption is fundamentally wrong. See Government June Reply Comments at 22-26. Title III expressly authorizes law enforcement to monitor all pertinent conversations that can be intercepted through the telecommunications facilities specified in the interception order, regardless of the identity of the subscriber, the subject, or the other speakers.[10] Even if none of the parties to a particular conversation is named in the interception order, law enforcement may conduct a legal interception, subject to Title III's minimization

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[10] Law enforcement routinely, and properly, performs interceptions where the subscriber whose telecommunications facilities are under surveillance is not a criminal suspect but there is nonetheless probable cause to believe that the facilities will be used in connection with criminal activity. See, e.g., United States v. Miller, 116 F.3d 641, 661-662 (2d Cir. 1997) (interception of the defendant's mother's facilities was proper because the mother's "telephone was used to place calls to many telephones where [gang] members lived or conducted illegal business, and * * * several calls were received from state prisons where gang members were incarcerated"); United States v. Elder, 90 F.3d 1110, 1133 (6th Cir. 1996) (sustaining wiretap of defendant's mother's phone because Title III is satisfied by a showing of "probable cause that the telephone at issue is being used in an illegal operation"); United States v. Meling, 47 F.3d 1546, 1552 (9th Cir. 1995) (explaining that when the defendant moved to his parents' home, "their phone * * * became the target of the wiretap").

requirements, if the conversation takes place over the facilities that are subject to the order. United States v. Kahn, 415 U.S. 143, 156-157 (1974).[11]

The commenters also argue that the Commission's tentative conclusion would distort the meaning of "facilities" under Title III. See EPIC Comments at 20-21; PCIA Comments at 24; US West Comments at 12. But as the Commission has pointed out, "the plain language of CALEA's Section 103 includes the terms 'equipment' and 'services', in addition to 'facilities.'" Notice ¶ 77. In any event, there is no basis in Title III itself for the commenters' efforts to restrict "facilities" to specific elements of a subscriber's equipment, such as "the connection between a subscriber's phone and the subscriber side port of the carrier's switch" (EPIC Comments at 21) or "the subscriber's CPE, loop or port" (US West Comments at 12). Because a Title III interception order may be directed toward any telecommunications facilities that may be used in furtherance of a crime, rather than simply toward a specified individual, "facilities" must be understood to cover the network elements (such as switches, peripheral devices, and signaling devices) that form the communications pathway where the communications that are subject to interception may be found. As long as law enforcement has probable cause to believe that particular telecommunications facilities are being used for criminal purposes, a court may grant it legal authority under Title III to intercept conversations there. See Government June Reply Comments at 27-30.

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[11] The commenters also make the assumption that the subject who drops off the conference call or places the remaining legs of the conference call on hold is the person whom law enforcement suspects of criminal activity. That assumption is likewise incorrect. It may well be that the party whom law enforcement is interested in monitoring is on one of the held legs of the conference call, and that the Title III order is directed at the facilities of a third party because law enforcement has established that those facilities are being used "remotely" by the criminal suspect in this fashion.